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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JULIA DAVIS and BOBBY)
JOE DAVIS,)
Plaintiffs,)

Case No. EDCV 07-0481-VAP
(OPx)

v.)

[Motion filed on December
21, 2009]

UNITED STATES OF)
AMERICA, JEFFREY DEAL,)
and HERBERT KAUFER,)
Defendants.)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
UNITED STATES OF AMERICA'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Defendant the United States of America's Motion for Partial Summary Judgment came before the Court for a hearing on January 25, 2010. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS in part and DENIES in part the Motion, as set forth below.

I. INTRODUCTION

On April 23, 2007, Plaintiffs Julia and Bobby Joe ("BJ") Davis filed this action against Defendants the

1 United States of America ("the United States" or "the
2 Government") and United States Immigration and Customs
3 Enforcement ("ICE") Agents Jeffrey Deal¹ ("Deal") and
4 Herbert Kaufer² ("Kaufer"). The action alleges a variety
5 of wrongful acts by government agents following a 2004
6 complaint of sexual harassment lodged by Julia Davis, a
7 United States Customs and Border Protection ("CBP")³
8 employee, including searches of Plaintiffs' office and
9 residence in 2004 and 2005, the 2005 arrest and
10 prosecution of Plaintiffs on federal immigration fraud
11 charges, and the 2006 arrest and prosecution of
12 Plaintiffs on state firearms charges.

13
14 The operative complaint is the Second Amended
15 Complaint ("SAC"), filed on July 17, 2008. It contains
16 eight claims, two of them brought against only Defendants
17 Deal and Kaufer pursuant to Bivens v. Six Unknown Named
18 Agents of Federal Bureau of Narcotics, 403 U.S. 388
19 (1971), asserting violations of Plaintiffs' rights under
20 the First and Fourth Amendments to the United States

21
22 ¹ The claims against Defendant Deal were dismissed by
23 the Court, with prejudice, pursuant to stipulation by the
24 parties, on January 25, 2010.

25 ² The claims against Defendant Kaufer were dismissed
26 by the Court, with prejudice, pursuant to stipulation by
27 the parties, on January 21, 2010.

28 ³ Both CBP and ICE are component agencies within the
United States Department of Homeland Security ("DHS").
Various actions at issue in this case were taken by each
of these agencies, and some others were taken by
officials in DHS headquarters.

1 Constitution. (SAC ¶¶ 83, 117.) The other six claims,
2 brought only against the Government pursuant to the
3 Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346,
4 2671-80, are for false imprisonment, malicious
5 prosecution, abuse of process, trespass, conversion, and
6 intentional infliction of emotional distress. The claims
7 for conversion and false imprisonment have been dismissed
8 in their entirety, as has a portion of the trespass
9 claim. (Doc. Nos. 127, 242.)

10
11 On December 21, 2009, the Government filed a motion
12 for partial summary judgment solely on Plaintiffs'
13 malicious prosecution and abuse of process claims. On
14 December 28, 2009, Plaintiffs attempted to file an
15 opposition to the Motion, but the Court ordered that
16 filing stricken on January 5, 2010, due to various
17 violations of Local Rules and the Court's Standing Order.
18 (Doc. No. 258.)

19
20 On January 7, 2010, Plaintiffs filed an amended
21 memorandum in opposition to the Motion, an "Amended
22 Separate Statement of Genuine Issues" ("PSGI"), a
23 Declaration of Julia Davis, and 80 supporting exhibits.⁴

24
25 ⁴ To comply with the Court's page limits, Plaintiffs'
26 counsel removed the 36-page section entitled "Summary of
27 Facts" from its initial 54-page memorandum, and replaced
28 it with the following statement: "Plaintiffs hereby
incorporate by reference the Declaration of Julia Davis,
which is filed concurrently herewith." Plaintiffs added

(continued...)

1 On January 14, 2010, the Government filed a Reply and
2 Plaintiffs filed a "Supplemental Brief in Opposition."
3 The Government filed a Response to this Brief on January
4 20, 2010. The propriety and merits of these filings are
5 discussed separately below.

7 **II. EVIDENTIARY ISSUES**

8 Before resolving the merits of the Motion, the Court
9 first must address serious problems presented by the
10 evidence submitted and relied upon by both the Government
11 and Plaintiffs.

13 **A. The Government's Evidence**

14 As required by the Local Rules of this Court, the
15 Government filed a Statement of Uncontroverted Facts and
16 Conclusions of Law in support of its Motion for Partial

17
18
19 ⁴(...continued)
20 seven pages of material to their memorandum of points and
21 authorities. Thus, although the Amended Opposition
22 complies with the letter of the Court's Standing Order
23 and January 5, 2010 Order striking the original
24 opposition, it runs counter to the See Orantes-Hernandez
25 v. Gonzales, 504 F. Supp. 2d 825, 850 (C.D. Cal. 2007),
26 citing St. John v. McElroy, No. 95 CIV 9810 (KMW), 1996
27 WL 49956, at *3-*4 (S.D.N.Y. Feb. 6, 1996) clear spirit
28 of those Orders. (failure to comply with spirit of Court
order even if in compliance with strict letter is
evidence of lack of good faith). Nonetheless, in order
to resolve this motion, and advance this case (filed
nearly three years ago), the Court considers Plaintiffs'
Amended Opposition. Any further failure to comply with
both the letter and spirit of the Federal Rules of Civil
Procedure, the Federal Rules of Evidence, the Local Rules
of this Court, and this Court's Standing Order may result
in sanctions against counsel.

1 Summary Judgment. (Doc. No. 246-1 ("DSUF").) In the
2 DSUF, the Government stated:

3 The United States incorporates the
4 Uncontroverted Facts submitted by Co-Defendants
5 Herbert Kaufer and Jeffery [sic] Deal [Doc. Nos.
6 244-3 and 239-3] and exhibits, by reference to
7 its Statement of Uncontroverted Facts and
8 Conclusions of Law.

9 (DSUF ¶ 1 (alterations in original).) In the DSUF, the
10 Government cites to deposition testimony lodged with the
11 Court only in connection with Defendant Kaufer's Motion
12 for Summary Judgment. (DSUF ¶ 3.) Plaintiffs object to
13 this "incorporation." (PSGI ¶ 1.)

14 The Ninth Circuit has held that, when deciding a
15 summary judgment motion, a court need not "perform a
16 search, unassisted by counsel, through the entire record,
17 to look for [e]vidence" that creates a genuine issue of
18 material fact. Carmen v. San Francisco Unified School
19 Dist., 237 F.3d 1026, 1030 (9th Cir. 2001). See also Orr
20 v. Bank of Am., 285 F.3d 764, 774-75 (9th Cir. 2002)
21 (failure to cite to page and line number of deposition
22 testimony in Statement of Undisputed Facts warrants
23 exclusion of evidence). But "Rule 56 may be adequately
24 satisfied by a lawyer designating where (outside the
25 opposition papers) the critical evidence can be found and
26 what it says, though ordinarily the better practice would
27 be to photocopy and attach the evidence to the opposition
28 papers." Carmen, 237 F.3d at 1030.

1 The rule set out in Carmen applies equally to
2 evidence submitted in support of a motion for summary
3 judgment, and the Court need not scour the record to find
4 support for uncontroverted facts. "Judges are not like
5 pigs, hunting for truffles buried in briefs." Indep.
6 Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th
7 Cir. 2003), quoting United States v. Dunkel, 927 F.2d
8 955, 956 (7th Cir. 1991). The Government thus cannot
9 generally "incorporate" the Statements of Facts and
10 exhibits filed by Deal and Kaufer *en toto*. The Court may
11 only consider the evidence that the Government has
12 specifically identified, *i.e.*, only the deposition
13 testimony of Julia Davis lodged in connection with
14 Kaufer's motion.

15
16 Even if it was not attached to the Government's
17 motion, this testimony can be considered so long as it is
18 a part of the record - but it is not here. Agent
19 Kaufer's Motion for Summary Judgment was withdrawn on
20 December 21, 2009.⁵ "The effect of withdrawal of a
21 motion is to leave the record as it stood prior to the
22 filing as though the motion had never been made." 56 Am.
23 Jur. 2d Motions, Rules, and Orders § 32. See also
24 Caldwell-Baker Co. v. S. Ill. Railcar Co., 225 F. Supp.
25 2d 1243, 1259 (D. Kan. 2002); Remley v. Lockheed Martin

27 ⁵ The Government's Motion was filed later the same
28 day.

1 Corp., No. C00-2495CRB, 2001 WL 681257, at *2- *3 (N.D.
2 Cal. 2001). Hence, neither Agent Kaufer's motion nor any
3 of the documents and exhibits filed in support of it
4 remain a part of the record in this case. The Court thus
5 SUSTAINS Plaintiffs' objection to the admission of the
6 deposition transcript, as well as all references to
7 filings and evidence submitted in connection with the
8 now-withdrawn motions.⁶

9
10 **B. Plaintiffs' Evidence**

11 **1. Plaintiffs' Amended Separate Statement of Genuine**
12 **Issues**

13 In its January 5, 2010 Order, the Court noted that
14 Plaintiffs' Separate Statement of Genuine Issues violated
15 Local Rule 56-2, in that it was not a "concise 'Statement
16 of Genuine Issues' setting forth all material facts as to
17 which it is contended there exists a genuine issue
18 necessary to be litigated." (Doc. No. 258 at p. 2.) In
19 connection with their Amended Opposition, Plaintiffs
20 filed an Amended Separate Statement of Genuine Issues.
21 In this filing, Plaintiffs include extensive legal
22 arguments about their theory of the case in the guise of
23 "responses" to the Government's undisputed facts. See,
24 e.g., PSGI ¶ 2 (2.5 page response discussing search of
25 Davises' residence as response to undisputed fact

26
27 ⁶ Plaintiffs' responses to Deal's and Kaufer's
28 Statements of Undisputed Facts are thus irrelevant and
not considered.

1 regarding mailing of correspondence to San Bernardino
 2 County District Attorney). In doing so, Plaintiffs fail
 3 to accomplish the purpose of an SGI: to identify clearly
 4 what facts are in dispute.

5 6 **2. Julia Davis's Declaration**

7 Plaintiffs have produced a 37-page declaration from
 8 Plaintiff Julia Davis. Much of the declaration is
 9 inadmissible, as it includes statements as to the
 10 feelings, intent and knowledge of other individuals and
 11 entities,⁷ which lack foundation, as they have no basis
 12 in either Mrs. Davis's personal knowledge or the attached
 13 exhibits, and statements of legal argument and legal
 14
 15

16 ⁷ See, e.g., Davis Decl. ¶ 6 (stating her supervisor
 17 was a "known sexual predator"); ¶ 20 (stating certain
 18 findings of an EEOC Administrative Law Judge ("ALJ") are
 19 "obviously a great embarrassment to the DHS"); ¶ 23
 20 (stating DHS "attempted to conceal" the ALJ's ruling
 21 "since they were not successful in attempting to
 22 invalidate the judicial determination" and speculating
 23 why DHS amended a report to Congress); ¶ 26 (stating that
 24 ICE agents "were obviously concerned not with the
 25 underlying incident, but with whether they could find
 26 some possible misstatement"); ¶ 40 ("It is clear from the
 27 outset of the investigation I was viewed as the suspect
 28 and all efforts were made to protect Ms. Boutwell. . .");
 ¶ 49 ("the government was aware that my requests for
 unpaid leave to care for my husband BJ were proper"); ¶
 51 ("In exchange for Kates' cooperation in providing
 unauthorized access to BJ Davis' and my personal
 documents . . . , Kaufer and Deal queried BJ Davis' name
 in law enforcement databases . . ."); ¶ 58 ("these
 agents were continuing their pursuit of BJ Davis and I
 with the hope of initiating criminal matters . . ."); ¶
 66 (stating DHS agents "recruited civilians" to steal
 Davis' mail and impersonate her); ¶ 69 ("Agent Deal
 intentionally misrepresented . . ."); ¶ 85 (noting effect
 of "malicious prosecution" on former co-workers).

1 conclusion,⁸ which are inappropriate in a Rule 56(e)
 2 declaration. See Shakur v. Schriro, 514 F.3d 878, 889
 3 (9th Cir. 2008) (rejecting affidavit submitted in
 4 connection with summary judgment that failed to
 5 "affirmatively show personal knowledge of specific
 6 facts"); Silver v. Executive Car Leasing Long-Term
 7 Disability Plan, 466 F.3d 727, 732 n. 2 (9th Cir. 2006)
 8 (affirming exclusion of declaration which contained legal
 9 argument under Rule 56, noting such argument is "not
 10 appropriate for a declaration"). The Court does not
 11 consider any such statements.

12
 13 Plaintiffs also seek to introduce 80 exhibits through
 14 Julia Davis's declaration. The proper foundation for
 15 these exhibits "need not be established through personal
 16 knowledge but can rest on any manner permitted by Federal
 17 Rule of Evidence 901(b) or 902." Sec. & Exch. Comm'n v.
 18 Phan, 500 F.3d 895, 913 (9th Cir. 2007), quoting Orr, 285

20 ⁸ See, e.g., ¶ 22 ("This act alone demonstrates an
 21 ulterior motive for targeting BJ Davis and I for
 22 prosecution. The government could hardly have been more
 23 blatant in its efforts to use the filing of criminal
 24 charges to avoid the DHS's liability on my EEO
 25 complaint."); ¶ 47 ("The only possible reason for such a
 26 disclosure was to engender bias against me because of my
 27 having brought a harassment claim against the DHS."); ¶
 28 51 ("Such a query of [B.J. Davis's] name was completely
 against [DHS] guidelines and regulations"); ¶ 55
 (discussing who had legal authority to release certain
 documents under Nevada law); ¶ 66 (opining that agents
 "arranged a traffic stop without probable cause"); ¶ 75
 ("There was no basis for the government's prolonged
 search of the residence. . . "); ¶¶ 76-77 (discussing law
 of search and seizure).

1 F.3d at 774. Several of these exhibits are not
2 sufficiently authenticated, lack foundation, or are
3 otherwise inadmissible, though, and thus the Court cannot
4 consider them.⁹

5
6 Exhibit 45 is a document labeled "Confidential," with
7 no other indication as to what it is. In Davis's
8 Declaration, she merely states that the document is a
9 "true and correct copy of a document produced by the
10 government in the Case No. CR 05-757-AHM and Bates
11 Numbered 624 to 625." (Davis Decl. ¶ 130.) This
12 statement fails to identify what the document is, and
13 thus the exhibit lacks foundation and is inadmissible.
14 See, e.g., Bellah v. Am. Airlines, Inc., 656 F. Supp. 2d
15 1207, 1210 n. 4 (E.D. Cal. 2009); Calloway v. Contra
16 Costa County Jail Corr. Officers, No. C 01-2689 SBA, 2007
17 WL 134581, at *12 (N.D. Cal. Jan. 16, 2007).

18
19 Exhibit 17 is an "excerpt of an OPR interview with
20 Officer Carolina Cisneros." (Davis Decl. ¶ 102.) "A
21 deposition or an extract therefrom is authenticated in a
22 motion for summary judgment when it identifies the names
23 of the deponent and the action and includes the
24 reporter's certification that the deposition is a true

25
26 ⁹ Many exhibits not addressed here also pose serious
27 admissibility questions. However, Plaintiffs do not cite
28 to these exhibits for any issues relevant to this motion,
and thus the Court need not determine their
admissibility.

1 record of the testimony of the deponent." Orr, 285 F.3d
2 at 774, citing Fed. R. Evid. 901(b); Fed. R. Civ. P.
3 56(e) & 30(f)(1). The excerpt provided includes none of
4 these features, and Davis cannot authenticate this
5 exhibit by stating merely that it is a "true and correct
6 copy" of the transcript. See Orr, 285 F.3d at 776. Two
7 other exhibits are similarly unauthenticated transcript
8 excerpts. (Davis Decl., Exs. 35, 37.) All three
9 exhibits are inadmissible, and not considered by the
10 Court.

11
12 Exhibit 48, the Declaration of Attorney Peter
13 Szabadi, which is cited for the legal conclusions as to
14 who could give consent for a search of corporate property
15 under Nevada law and whether Mr. Davis had an
16 "expectation of privacy" under federal constitutional
17 law, Davis Decl. ¶¶ 55-56, is inadmissible for these
18 purposes. See Nationwide Transp. Fin. v. Cass Info.
19 Sys., Inc., 523 F.3d 1051, 1058-59 (9th Cir. 2008).

20 21 **3. Plaintiffs' Supplemental Brief**

22 On January 14, 2010, Plaintiffs filed a "Supplemental
23 Brief in Opposition to the United States Motion for
24 Partial Summary Judgment," along with several
25 accompanying exhibits.¹⁰ The Brief concerns a July 20,

26 _____
27 ¹⁰ Although within the text of this brief,
28 Plaintiffs "request leave" for such a filing, the proper
(continued...)

1 2007 report prepared by the DHS Office of Inspector
2 General ("OIG") ("the OIG Report") at the conclusion of
3 an investigation into many of the events at issue in this
4 action.

5
6 Plaintiffs contend that they did not learn of the
7 existence of the OIG Report until a deposition conducted
8 on November 12, 2009, and they subsequently discovered
9 that one of the Government's experts had reviewed the
10 report in preparing his expert testimony. (Shayesteh
11 Decl. ¶¶ 2-3.) The Government produced a copy of the OIG
12 Report on December 22, 2009. (Id. ¶ 5.) This copy did
13 not include most of the exhibits attached to the
14 original, however, and a section of the Report was
15 redacted. (Id.) On January 11, 2010, the Government
16 produced an unredacted version of the OIG Report, which
17 included statements made by Assistant United States
18 Attorney John Lee to OIG investigators. (Id. at ¶ 8.)

19
20 In the Supplemental Brief, Plaintiffs ask the Court
21 to (1) consider the unredacted version of the OIG Report
22 in ruling on this motion and (2) compel the production of
23 the exhibits attached to the original report.

24
25
26 _____
27 ¹⁰(...continued)
28 course would have been to file a separate ex parte
application seeking leave to file this brief.

1 The Court has reviewed the unredacted material and
2 finds it has no impact on the pending motion, as it only
3 speaks to why the federal immigration fraud charges were
4 dismissed and whether they should have been filed in the
5 first instance. As the Court explains below, Plaintiffs'
6 claims regarding these issues are barred as a matter of
7 law. Moreover, the unredacted OIG Report is subject to a
8 protective order in this case, and Plaintiffs failed to
9 comply with the terms of that order, which requires such
10 documents to be filed under seal. (Doc. No. 78; Pls.'
11 Supp. Br., Ex. 4.) The Government has thus requested the
12 Court order this and all other exhibits to Plaintiffs'
13 Supplemental Brief be not only stricken, but deleted from
14 the Court's electronic filing system. That request is
15 granted in a separate minute order.

16
17 As to the exhibits that Plaintiffs would have the
18 Court summarily order the Government to produce,
19 Plaintiffs cite no authority or justification for such
20 extraordinary relief, long after any and all discovery
21 deadlines have passed. Moreover, in its response to
22 Plaintiffs' Supplemental Brief, the Government has
23 indicated that it has now produced the exhibits to
24 Plaintiffs' counsel. (Lantka Decl. ¶ 11.)

1 Accordingly, the Court orders Plaintiffs'
 2 Supplemental Brief and all accompanying exhibits
 3 STRICKEN.

4 **III. UNCONTROVERTED FACTS**

5 The following facts are supported adequately by
 6 admissible evidence and are uncontroverted by admissible
 7 evidence on the record. They are "admitted to exist
 8 without controversy" for the purposes of this Motion.
 9 See Local Rule 56-3.

10 **A. Julia Davis's Employment with CBP**

11 **1. The Sexual Harassment Complaint and** 12 **Investigation**

13 In 2002, Julia Davis began employment as a Customs
 14 and Border Protection ("CBP") Agent, stationed at the
 15 Port of Entry in San Ysidro, California ("the Port").
 16 (Davis Decl. ¶¶ 5-6.) Soon after beginning her
 17 employment, her supervisor, Kevin Crusilla, began to
 18 sexually harass her. (Davis Decl. ¶¶ 6-7, Ex. 1 (June
 19 17, 2005 Order and Opinion of Equal Employment
 20 Opportunity Commission ("EEOC") Administrative Law Judge
 21 ("ALJ") ("EEOC Op.") at p. 5.)¹¹ She reported the
 22 harassment to numerous supervisors, to no avail, before
 23 escalating her complaint to the Deputy Port Director.
 24 (Davis Decl. ¶¶ 7-8, EEOC Op. at p. 7.) The Deputy Port
 25

26
 27 ¹¹ The Court exercises its discretion to admit the
 28 EEOC Order and Opinion into evidence. See Amantea
Cabrera v. Porter, 279 F.3d 746, 749 (9th Cir. 2002).

1 Director told Davis a full investigation would be
2 launched by the DHS OIG. (Davis Decl. ¶ 8, EEOC Op. at
3 p. 7.) The harassment nonetheless continued. (Id.)

4
5 Julia Davis then obtained a Temporary Restraining
6 Order and Preliminary Injunction from the California
7 Superior Court ordering Crusilla not to harass her.
8 (Davis Decl. ¶ 9; EEOC Op. at 8.)

9
10 At some point, Julia Davis lodged a sexual harassment
11 complaint with the DHS Office of Professional
12 Responsibility, the office in which Agents Deal and
13 Kaufer worked. (Davis Decl. ¶ 11.) She also filed a
14 grievance against DHS with the EEOC. (Davis Decl. ¶ 12.)
15 Crusilla refused to cooperate with either the OIG or
16 EEOC, and was allowed to retire without penalty in
17 October 2003. (Davis Decl. ¶ 13, Ex. 12, EEOC Op. at p.
18 9.) A November 2003 ICE Office of Internal Audit
19 investigation substantiated Davis's sexual harassment
20 allegations, but no action was taken due to Crusilla's
21 retirement. (Davis Decl., Ex. 12.)

22
23 On June 25, 2005, the EEOC ALJ issued a preliminary
24 decision finding Davis had been subjected to unlawful
25 sexual harassment, awarded her \$145,500 in compensatory
26 damages, and ordered the development of sexual harassment

1 policies and procedures and mandated sexual harassment
2 training at the Port. (EEOC Op. at pp. 18, 21-25.)¹²

3 **2. Julia Davis's Reports of "Security Breaches" and** 4 **Investigations**

5 In the summer of 2004, Julia Davis sent several
6 letters to various supervisors and DHS officials about
7 what she saw as threats to security at the Port.

8
9 In June 2004, Davis sent a letter to the Port
10 Director expressing concern over the reduction of
11 security staff and removal of metal detectors and X-ray
12 equipment from the Port. (Davis Decl. ¶ 24, Ex. 13.)
13 Also in June 2004, Davis sent a letter to the DHS OIG,
14 describing an incident where she observed an Assistant
15 Port Director instruct a CBP Agent to falsify a person's
16 nationality on several documents. (Davis Decl. ¶ 25, Ex.

17
18 ¹² On August 18, 2005, DHS filed a motion before the
19 EEOC ALJ requesting that the Order be held in abeyance
20 pending the resolution of the federal immigration fraud
21 charges, discussed further below, as a conviction would
22 purportedly deprive the EEOC of jurisdiction over the
action. (Davis Decl., Ex. 2.) The ALJ denied the motion
and issued a final decision and order, which adopted his
preliminary decision. (Davis Decl., Ex. 3.)

23 The ALJ also determined that Davis's August 2004
24 resignation, discussed below, was involuntary. (EEOC Op.
25 at p. 10.) In its review of related Merit Systems
26 Protection Board ("MSPB") proceedings, the Court of
27 Appeals for the Federal Circuit affirmed the MSPB's
contrary finding, and held that "[t]he issue of
involuntary resignation was not litigated before the EEOC
and it was not necessary to resolve the sexual harassment
claim," and thus non-binding dicta. Davis v. Dep't of
Homeland Sec., 305 Fed. App'x 659, 661 (Fed. Cir. 2008)
28 (per curiam).

1 14). On August 3, 2004, Agent Deal and Agent Robert
2 Broyles interviewed Davis about this incident. (Davis
3 Decl. ¶ 26, Ex. 15.)

4
5 On July 5, 2004, Davis sent a letter to the Federal
6 Bureau of Investigation ("FBI") to report an "unusually
7 high number of individuals" who had entered the United
8 States through the Port over the July 4 holiday from
9 "special interest countries," and noted an insufficient
10 number of Intelligence Officers were on duty that day.
11 (Davis Decl. ¶ 30, Ex. 20.) She stated that the Port
12 was not "secure under the current administration." (Id.)
13 This letter was received by a reporter for the Los
14 Angeles Times, who confronted CBP Commissioner Robert
15 Bonner about it at a press briefing. (Davis Decl., Ex.
16 24 (Fasano Dep.) 109:15-22; Ex. 25 at pp. 2-4.) CBP then
17 launched an investigation of Julia Davis to determine if
18 any misconduct was involved when she sent the July 5,
19 2004 letter. (Davis Decl., Ex. 27.)

20
21 **3. Julia Davis's Cellular Telephone Damage Claim
and Investigation**

22 Also in July 2004, Julia Davis filed a tort claim for
23 damages to her cellular telephone, alleging her
24 supervisor, Susan Boutwell, dropped Davis's bag, which
25 contained the phone, "aggressively and with specific
26 intent." (Davis Decl. ¶ 36, Ex. 34.) An investigation
27 was launched, led by Agent Deal, who was told by Agent
28

1 Kaufer to give the investigation "priority." (Id.; Davis
2 Decl., Ex. 9 ("Deal 2005 Dep.") 21:8-23:10.) Boutwell
3 denied touching Davis's bag, and told the Port Director
4 that this was "one of the many fictitious complaints that
5 Julia Davis has invented" and was designed "to bolster
6 her lawsuit against the [CBP]." (Davis Decl., Ex. 29.)
7 Boutwell and Davis both were interviewed later by Agent
8 Deal about this incident. (Davis Decl. ¶¶ 39, 41; Ex.
9 30, p. 24; Deal 2005 Dep. 58:2-24.)¹³.

10
11 After completing the investigation of the claim in
12 October 2004, Agent Kaufer wrote a report concluding that
13 Julia Davis had "made a false allegation against her
14 supervisor and lied under oath." (Davis Decl., Ex. 34 at
15 ¶ 6.) Agent Kaufer stated that the videotape recording
16 of the area at issue refuted Julia Davis's claims. (Id.
17 at ¶ 5.)

18
19 **4. Investigation of Julia Davis's February 2004
Leave to Care for BJ Davis**

20 In February 2004, Julia Davis took an unpaid leave of
21 absence under the Family and Medical Leave Act (FMLA) to
22 care for her husband, BJ Davis, while he was working
23 directing a movie, "Forget About It," on set in Arizona.

24
25 ¹³ In her Declaration, Julia Davis states that
26 Boutwell changed her position after viewing videotape
27 that showed her moving the bag. (Davis Decl. ¶ 38.)
28 Neither the cited portion of the transcript of Boutwell's
interview, nor any other portion of the excerpt of that
interview submitted to the Court, provide support for
this statement.

1 (Davis Decl. ¶ 48, Ex. 43.) BJ Davis had been diagnosed
2 with an unidentified "potentially terminal illness."
3 (Davis Decl. ¶ 49.) As part of their investigation of
4 the tort claim, Agents Deal and Kaufer also investigated
5 this leave based on information that Julia Davis had
6 actually been working on the movie with BJ Davis. (Deal
7 2005 Dep. 59:4-60:15.) Julia Davis maintains she was not
8 working on the movie. (Davis Decl. ¶ 49.)

9
10 Among the interviews conducted as part of the agents'
11 investigation were several meetings with Kimberly Kates,
12 interim President of Beverly Hills Film Studios, Inc.
13 ("BHFS"). (Davis Decl., Ex. 44 ("Kates Decl.") ¶¶ 2-17.)
14 BJ Davis previously had served as President of BHFS until
15 a dispute which was the subject of civil litigation
16 between BJ Davis, BHFS, Kates, and other persons. See
17 Davis Decl., Ex. 50 (Complaint, BJ Davis v. Beverly Hills
18 Film Studios, Inc., et al., Los Angeles Super. Ct. No. BC
19 323455, Oct. 25, 2004). This lawsuit was pending at the
20 time Kates was approached by Agents Kaufer and Deal; it
21 later was settled. (Kates Decl. ¶¶ 13, 19.) When Agent
22 Kaufer initially contacted Kates, he said he needed to
23 discuss BHFS's "defamatory" use of a DHS logo, and told
24 her the FBI in Arizona was investigating her and her
25 company, and BJ Davis had instigated the investigation.
26 (Kates Decl. ¶ 2, Supp. ¶ 1.) Kates ultimately spoke
27 with Agent Kaufer more than 15 times, and Agent Deal six
28

1 or seven times. (Kates Decl. ¶ 2.) In the course of
2 these conversations, Agent Kaufer told Kates that DHS had
3 performed a "full search" on BJ Davis and discovered he
4 had been convicted of murder and had a "violent past."
5 (Kates Decl. ¶ 4.) At one point, he allowed Kates to
6 "glance at the file with BJ's criminal charge of
7 Murder/Theft." (Id.)

8
9 Agent Kaufer also asked Kates about Julia Davis's
10 involvement in the production of "Forget About It" and
11 about BJ Davis's health at that time. (Kates Decl. ¶¶ 5-
12 6, 9-10.) Kates told him that Julia Davis had only
13 worked on the film as a writer, and that, although she
14 did not know details, BJ Davis "seemed genuinely sick."
15 (Id.)

16
17 Agent Kaufer also told Kates that the Agents were
18 investigating "any criminal activity by Julia Davis," and
19 wanted to know if Kates thought Julia Davis was "faking"
20 her sexual harassment claim. (Kates Decl. ¶ 7.) Kates
21 responded she had no reason to believe Julia was making
22 up the sexual harassment allegations. (Id. ¶¶ 7, 14.)

23
24 Kates told Agents Kaufer and Deal that BJ Davis had
25 told her that her "actions would lead to [her] demise,"
26 and that she had been told by a coworker that BJ had
27 threatened to kill another coworker. (Kates Decl. ¶ 3,
28

1 Supp. ¶ 3.) Agent Kaufer urged Kates to file criminal
2 charges against BJ Davis and seek a temporary restraining
3 order based on these threats, but she chose not to, as
4 she "didn't take the threats that seriously." (Kates
5 Decl. ¶ 3, Supp. ¶ 2.)

6 7 **5. The Results of the Investigations**

8 On August 20, 2004, Associate Special Agent in Charge
9 of the OPR, James Wong ("Wong"), sent a letter to Joyce
10 Henderson, CBP San Diego Field Office Acting Director,
11 Field Operations. (Davis Decl., Ex. 40.) In that
12 letter, Agent Wong stated:

13 We have found evidence, which would lead a
14 reasonable person to substantiate numerous
15 charges of falsification against CBPI Davis to
16 include: knowingly making false allegations
against agency personnel, making false
statements under oath and filing a fraudulent
tort claim.

17 (Id.) Citing security concerns, Agent Wong recommended
18 Julia Davis be placed on administrative leave pending
19 review by the CBP Disciplinary Review Board. (Id.)
20 Later that same day, Henderson acted upon this
21 recommendation and placed Julia Davis on administrative
22 leave. (Davis Decl., Ex. 41.) Davis tendered her
23 resignation the same day, as a result of what she
24 identifies as "blatant retaliation" for her EEOC claim
25 and letters about security concerns.¹⁴ (Davis Decl. ¶¶

26 _____
27 ¹⁴ Julia Davis later appealed to the MSPB in an
28 attempt to get her job back. (Davis Decl., Exs. 25, 42,
(continued...)

57, 60.) Three weeks later, a determination was made that Julia Davis's FMLA leave request was fraudulent. (Davis Decl., Ex. 43.)

B. The Federal Criminal Action

1. The Investigation and Filing of Charges

In January 2005, Agent Deal began an investigation into potential marriage fraud by the Davises, based on information received from the CBP Office of General Counsel that Julia Davis married BJ Davis in February 1995, emigrated to the United States in June 1995, and became a naturalized United States citizen in October 1999. (OIG Report at p. 2.) After completing his investigation, Agent Deal concluded that Julia Davis had "paid BJ Davis \$10,000 to marry her and then filed a petition that allowed her to immigrate to the United States." (*Id.*)¹⁵

Based on the results of this investigation, the United States Attorney's Office for the Central District of California sought to indict Julia Davis on charges of

¹⁴(...continued)
65.) This appeal was decided in favor of DHS in a decision affirmed by the Court of Appeals for the Federal Circuit on December 18, 2008. Davis v. Dep't of Homeland Sec., 305 Fed App'x 659 (Fed. Cir. 2008) (per curiam).

¹⁵ While Plaintiffs have produced evidence which calls the accuracy of this conclusion into dispute, Davis Decl. ¶ 2, they have not produced any evidence controverting the fact that Deal so concluded at the time.

1 conspiracy, 18 U.S.C. § 371; unlawful procurement of
2 citizenship, 18 U.S.C. § 1425(b); and aiding and abetting
3 unlawful procurement of citizenship, 18 U.S.C. §§ 2(a),
4 1425(b); and to indict BJ Davis on conspiracy and
5 unlawful procurement of citizenship charges alone. (OIG
6 Report at p. 2.)

7
8 On August 9, 2005, Julia and BJ Davis were indicted
9 on each of the charges by a grand jury in this District,
10 and arrest warrants were issued. (Davis Decl., Ex. 31
11 ("ICE Report") at p. 1.)

12 13 **2. The Execution of the Arrest Warrants**

14 Agent Deal and other ICE OPR Agents conducted
15 surveillance of the Davises' home in Yucca Valley for a
16 week before their grand jury indictment. (ICE Report at
17 p. 2; Davis Decl., Ex. 54 ("SRT Report") at p. 1.)
18 During that week, Agents Deal and Kaufer contacted the
19 ICE Special Response Team ("SRT"), seeking to use the SRT
20 to affect the arrests of the Davises, citing BJ Davis's
21 status as someone who had been "convicted of first-degree
22 murder" and Julia Davis's "former status as a federal
23 officer." (ICE Report at p. 2.) Agent Deal created an
24 Operational Plan for the SRT to employ in executing the
25 arrest warrants. (SRT Report at p. 1.)

1 On August 10, 2005, ten DHS Internal Affairs Agents,
2 a United States Marshal, seventeen SRT members, eight
3 unmarked cars and a Blackhawk helicopter arrived at the
4 Davises' residence in Yucca Valley to execute warrants
5 for the Davises' arrests.¹⁶ (ICE Report at p. 4; SRT
6 Report at pp. 2-3; Davis Decl., Ex. 55 ("Kot Decl.") ¶¶
7 2-3, 9; Ex. 56 ("Kovalska Decl.") ¶¶ 2, 4; Ex. 57 ("Judd
8 Decl."), Ex. 62.)

9
10 Agents first attempted to enter the house using a
11 battering ram on a side door. (ICE Report at p. 4;
12 SRT Report at p. 3.) They then entered through
13 another door, which was voluntarily opened by Julia
14 Davis's father, Mykola Kot. (SRT Report at p. 3.)
15 They then handcuffed and detained Kot and Julia
16 Davis's mother, Galyna Kovalska. (ICE Report at p.
17 5; SRT Report at p. 3; Kot Decl. ¶ 4; Kovalska Decl.
18 ¶¶ 5-7.) Kot, a sixty-one year old man who was
19 wearing only underwear and socks, was kept outside in
20 the sun for an hour while agents searched the house,
21 although he asked for medication and to be allowed
22 inside the house. (Kot Decl. ¶¶ 4, 6.) Kot's finger
23 was broken in the raid, and Kovalska was bruised.
24 (Davis Decl., Exs. 60.)

25
26
27 ¹⁶ Although Julia Davis discussed this at length in
28 her Declaration, Davis Decl. ¶¶ 68-75, there is no
foundation for her statements, as she was not present at
that time. The statements thus are inadmissible.

1 Neither Julia nor BJ Davis were present at the
2 house at the time the warrants were executed. (ICE
3 Report at p. 5; SRT Report at p. 3.) ICE Agents
4 searched the house, and seized a Remington shotgun
5 and seven rounds of ammunition from the master
6 bedroom of the house, "[s]ince BJ Davis is not to
7 possess firearms." (ICE Report at p. 5; see also
8 Davis Decl., Ex. 66, ¶¶ 3-4; SRT Report at p. 3.)¹⁷
9 The Agents also examined and took photographs of
10 personal effects within the house, and noted evidence
11 that suggested BJ Davis was living in the house and
12 staying in the master bedroom. (ICE Report at p. 5;
13 Kot Decl. ¶ 13; Kovalska Decl. ¶ 8.) The house was
14 "cleared" in approximately four minutes (SRT Report
15 at p. 3), but the search of the residence lasted
16 approximately one hour. (Kot Decl. ¶ 6.)

17 18 **3. Termination of the Federal Action**

19 BJ and Julia Davis surrendered to the United
20 States Marshal on August 16, 2005. (ICE Report at p.
21 6.) On March 3, 2006, the Government filed an ex
22 parte application to dismiss all charges against Mr.
23 and Mrs. Davis without prejudice, based on the
24 Davises' allegations of misconduct by OPR Agents
25 Deal, Kaufer, and Wong. (Case No. CR 05-757-AHM,

26
27 ¹⁷ Although there is conflicting evidence as to where
28 exactly the shotgun was found, (Davis Decl. ¶ 78; Ex. 31
at p. 5; Ex. 66, ¶ 4), this conflict is immaterial here.

1 Doc. No. 70; OIG Report at p. 3.) On March 7, 2006,
2 the Honorable A. Howard Matz granted the Government's
3 application. (Case No. CR 05-757-AHM, Doc. No. 74.)
4

5 **C. The State Criminal Charges**

6 In the course of his investigations of the
7 Davises' marriage, Agent Deal received information
8 that BJ Davis was arrested and sentenced for
9 involvement in a homicide¹⁸ in 1973 in Shreveport,
10 Louisiana. (OIG Report at p. 2; Davis Decl., Ex. 78
11 ("Deal 2009 Dep.") 129:2-137:20; Wong Letter Ex. 2.)
12 According to this information, BJ Davis was granted a
13 pardon on October 11, 1995, which restored all civil
14 rights except the right to possess firearms. (OIG
15 Report at p. 2.)
16

17 On August 11, 2005, the day after the raid on the
18 Davises' house, Agent Kaufer requested a weapons
19 trace on the shotgun taken from the residence.
20 (Davis Decl., Ex. 70.) In that request, he stated
21 that the shotgun "was recovered from the residence of
22 a convicted felon (manslaughter)." (Id.) The
23

24 ¹⁸ In their submissions on this motion, Plaintiffs
25 accurately note that BJ Davis was convicted of
26 manslaughter, and not murder. See, e.g., Davis Decl. ¶
27 69; Wong Letter, Ex. 2. All records of the conviction
28 before the Court, which Agent Deal purportedly reviewed,
refer to the crime as a manslaughter. The OIG
Investigative report, however, as well as Deal in his
deposition, refer to the crime as a "murder."

1 Firearms Trace Summary, produced by the Department of
2 Justice, Bureau of Alcohol, Tobacco, Firearms and
3 Explosives National Tracing Center, showed that the
4 shotgun had been purchased by Julia Davis on April 5,
5 2005. (Davis Decl., Ex. 71.)

6
7 On November 18, 2005, Agent Kaufer sent Assistant
8 United States Attorney John Lee, who was prosecuting
9 the federal immigration fraud case, a letter
10 "strongly urg[ing]" Lee to charge BJ Davis with a
11 violation of 18 U.S.C. § 922(g)(1), which bars the
12 possession of firearms by convicted felons. (Davis
13 Decl., Ex. 72.) No such charge was ever brought.

14
15 On December 9, 2005, Agent Wong¹⁹ mailed a letter
16 to Rick Young, Supervisory Deputy District Attorney
17 in the San Bernardino County District Attorney's
18 Office, and Max Pfenning, Special Agent in the
19 California Department of Justice Firearms Division.
20 (Def.'s Ex. 1 ("Wong Letter").) The letter stated
21 that, on August 9, 2005, agents found a loaded
22 Remington shotgun at the Davises' residence in Yucca
23 Valley, California. (Id. at p. 1.) It further
24 stated this was a "probable violation" of the
25 California Penal Code, based on BJ Davis's status as

26
27
28 ¹⁹ Agent Deal wrote the initial draft of this letter.
(Deal 2009 Dep. at 231:13-31.)

1 a convicted felon. (Id.) The letter mentioned that
2 DHS believed Julia Davis was aware of this violation,
3 based on documents filed in the earlier MSPB
4 proceedings and a previous civil action. (Id. at p.
5 2.)

6
7 The letter stated that BJ Davis had been
8 convicted of manslaughter and accessory after the
9 fact in Louisiana on June 21, 1974. (Wong Letter at
10 pp. 1-2.) It noted that BJ Davis was pardoned for
11 this crime on October 11, 1995, but with the
12 condition that he not "own, possess, receive, ship,
13 or transport firearms." (Id. at p. 2.) In the
14 letter, Agent Wong also included several details as
15 to the purchase of and ownership of the shotgun.
16 (Id.) Agent Wong also stated there was "strong
17 evidence" that BJ Davis had
18 "rented/acquired/possessed" other weapons from a
19 firearms dealer in Burbank, California, using funds
20 from BHFS. (Id. at p. 3.)

21
22 Along with the letter, Agent Wong attached
23 fifteen exhibits, including documents relating to the
24 immigration fraud charges filed against the Davises
25 and the Louisiana conviction and pardon, declarations
26 from Julia Davis's parents relating to the August 10,
27 2005 raid on the Davises' house, a motion from Julia
28

1 Davis's MSPB proceedings, and materials relating to
2 the settlement of the civil action between BJ Davis
3 and BHFS. (Wong Letter, Exs. 1-15.) The letter
4 referred the recipients to Agents Kaufer and Deal
5 should they seek more information or assistance
6 regarding the matter. (Id. at p. 3.) Agent Deal met
7 with Rick Young in the San Bernardino County District
8 Attorney's office in January 2006 and presented him
9 with information about the case. (Deal 2009 Dep.
10 236:16-22.)

11
12 On January 25, 2006, a felony complaint was filed
13 in the California Superior Court, County of San
14 Bernardino, charging both BJ and Julia Davis of
15 violating California Penal Code § 12021(a)(1) by
16 "own[ing], possess[ing], purchas[ing], receiv[ing],
17 and hav[ing] custody and control" of a shotgun, after
18 both were purportedly convicted of manslaughter on
19 June 21, 1974 in Louisiana. (Davis Decl., Ex. 73.)
20

21 On November 2, 2006, the Superior Court granted
22 both Davises' petitions to seal and destroy the
23 records of this arrest and declare them factually
24 innocent pursuant to Cal. Penal Code § 851.8. (Davis
25 Decl., Ex. 74.)
26
27
28

1 **D. The OIG Report**

2 On April 10, 2006, Julia Davis filed a complaint
3 against Agent Wong with the Washington, D.C. office
4 of ICE OPR in Washington regarding the events of
5 August 10, 2005. (Davis Decl., Ex. 76 ("OIG
6 Report"), Ex. 1 at pp. 6-24.) BJ Davis filed an
7 independent complaint with the same office on October
8 8, 2006, accusing Agents Deal, Broyles, Kaufer, and
9 Wong of improperly "divulging formal complaints and
10 protected disclosures made to the Federal Bureau of
11 Investigation" in an unrelated matter. (OIG Report,
12 Ex. 1 at p. 26.)

13
14 On June 13, 2007, the DHS OIG issued a Report of
15 Investigation on Agents Wong, Kaufer, Deal, and Group
16 Supervisor Robert Claborn and their involvement in
17 the raid and search on the Davises' residence, which
18 concluded "the use of the helicopter was appropriate
19 and that no warrant-less search was conducted." (OIG
20 Report at p. 1.)

21
22 **III. DISPUTED FACTS**

23 The following disputed fact is material and
24 relevant to Plaintiff's claims. There is conflicting
25 evidence as to what, if any, items other than the
26 shotgun were taken from the Davises' Yucca Valley
27 house on the day it was searched. Agent Deal
28

1 maintains that no items were seized. (Davis Decl.,
2 Ex. 66.) Witness Matthew Judd has stated that he saw
3 agents leaving the house with "white papers and boxes
4 with something sticking out of them" that they did
5 not have "when they first ran in." (Judd Decl.)
6 Julia Davis's parents, Mykola Kot and Galyna
7 Kovalska, have stated that documents and their
8 Ukrainian passports were taken from the house in the
9 search. (Kot Decl. ¶¶ 12, 15; Kovalska Decl. ¶ 13,
10 17.)

11 12 IV. LEGAL STANDARD

13 A motion for summary judgment shall be granted
14 when there is no genuine issue as to any material
15 fact and the moving party is entitled to judgment as
16 a matter of law. Fed. R. Civ. P. 56(c); Anderson v.
17 Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).
18 The moving party must show that "under the governing
19 law, there can be but one reasonable conclusion as to
20 the verdict." Anderson, 477 U.S. at 250.

21
22 Generally, the burden is on the moving party to
23 demonstrate that it is entitled to summary judgment.
24 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998);
25 Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.,
26 707 F.2d 1030, 1033 (9th Cir. 1983). The moving
27 party bears the initial burden of identifying the
28

1 elements of the claim or defense and evidence that it
2 believes demonstrates the absence of an issue of
3 material fact. Celotex Corp. v. Catrett, 477 U.S.
4 317, 323 (1986).

5
6 Where the non-moving party has the burden at
7 trial, however, the moving party need not produce
8 evidence negating or disproving every essential
9 element of the non-moving party's case. Celotex, 477
10 U.S. at 325. Instead, the moving party's burden is
11 met by pointing out that there is an absence of
12 evidence supporting the non-moving party's case. Id.
13 The burden then shifts to the non-moving party to
14 show that there is a genuine issue of material fact
15 that must be resolved at trial. Fed. R. Civ. P.
16 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S.
17 at 256. The non-moving party must make an
18 affirmative showing on all matters placed in issue by
19 the motion as to which it has the burden of proof at
20 trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S.
21 at 252. See also William W. Schwarzer, A. Wallace
22 Tashima & James M. Wagstaffe, Federal Civil Procedure
23 Before Trial § 14:144.

24
25 A genuine issue of material fact will exist "if
26 the evidence is such that a reasonable jury could
27 return a verdict for the non-moving party."
28

1 Anderson, 477 U.S. at 248. In ruling on a motion for
2 summary judgment, the Court construes the evidence in
3 the light most favorable to the non-moving party.
4 Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir.
5 1991); T.W. Electrical Serv. Inc. v. Pacific Elec.
6 Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir.
7 1987).

8 9 V. DISCUSSION

10 The FTCA provides that the United States may be
11 held liable for "personal injury or death caused by
12 the negligent or wrongful act or omission of any
13 employee of the Government while acting within the
14 scope of his office or employment, under
15 circumstances where the United States, if a private
16 person, would be held liable to the claimant in
17 accordance with the law of the place where the act or
18 omission occurred." 28 U.S.C. § 1346(b)(1). The
19 United States is to be held liable "in the same
20 manner and to the same extent as a private individual
21 under like circumstances." 28 U.S.C. § 2674. See
22 also United States v. Olson, 546 U.S. 43 (2005).

23
24 The Court thus examines Plaintiffs' tort claims
25 under California law, as the acts alleged occurred
26 within California. Bressi v. Ford, 575 F.3d 891, 900
27 n. 9 (9th Cir. 2009).

1 **A. Malicious Prosecution**

2 Plaintiffs' malicious prosecution claim is based
3 on their allegations that federal agents caused them
4 to be prosecuted, without probable cause, in the San
5 Bernardino County Superior Court on charges of being
6 convicted felons in unlawful possession of a firearm.
7 (SAC ¶ 128.)

8
9 To prevail on a claim of malicious prosecution, a
10 plaintiff "must establish that the prior underlying
11 action (1) was commenced by or at the direction of
12 the defendant, or the defendant continued to
13 prosecute it after discovering it lacked probable
14 cause, and it was pursued to a legal termination in
15 plaintiff's favor; (2) was brought without probable
16 cause; and (3) was initiated with malice." HMS
17 Capital, Inc. v. Lawyers Title Co., 118 Cal. App. 4th
18 204, 213 (2004). The Government argues that
19 Plaintiffs can establish neither that the action "was
20 commenced by or at the direction" of the United
21 States or its employees, nor that the federal agents
22 involved lacked probable cause.

23
24 **1. Commencement of the Action**

25 The Government argues that the San Bernardino
26 County District Attorney made the "independent
27 prosecutorial decision" to file the criminal charges
28

1 against Plaintiffs, and thus the federal
2 "investigatory agents" cannot be held liable for this
3 decision under a theory of malicious prosecution.
4 (Def.'s Mem. at 8-9.)

5
6 The Government bases this argument on General
7 Dynamics Corp. v. United States, 139 F.3d 1280 (9th
8 Cir. 1998). There, the Ninth Circuit held that a
9 plaintiff could not sustain a malicious prosecution
10 claim against a federal investigative agency under
11 the FTCA, based on a report the agency negligently
12 prepared and provided to federal prosecutors, who
13 brought an indictment against the plaintiff. Id. at
14 1283-86. The court's holding in General Dynamics,
15 however, was based explicitly on an interpretation of
16 a provision of the FTCA, 28 U.S.C. § 2680(a), which
17 bars claims against the United States for the
18 discretionary functions of its employees. The court
19 found the plaintiff's claim was an improper attempt
20 to "recharacterize" the prohibited claim against
21 federal prosecutors for their discretionary action as
22 a claim the investigators. 139 F.3d at 1286. Here,
23 there is no such attempt to evade 28 U.S.C. §
24 2680(a), as the prosecutors who made the decision
25 were state, not federal actors.²⁰

26 _____
27 ²⁰ This Court also has rejected previously the
28 Government's argument that the OPR Agents themselves were
(continued...)

1 Additionally, the Supreme Court's intervening
2 decision in United States v. Olson, 546 U.S. 43, 46
3 (2005), calls General Dynamics into question inasmuch
4 as it relied on principles of California law relating
5 to the liability of state and local law enforcement
6 officers for charging decisions by prosecutors.
7 Under California law, law enforcement officers are
8 statutorily immune from liability for malicious
9 prosecution. Asgari v. City of Los Angeles, 15 Cal.
10 4th 744, 752 (1997), citing Cal. Gov't Code section
11 821.6. The Supreme Court's decision in Olson makes
12 this immunity irrelevant, though.

13
14 In Olson, the Ninth Circuit had held that where
15 an FTCA claim is based on "unique governmental
16 functions," the Government would be liable if "a
17 state or municipal entity would be subject to
18 liability under the law where the activity occurred."
19 546 U.S. at 45, quoting 362 F.3d 1236, 1240 (9th Cir.
20 2004). Reversing the Ninth Circuit's decision, the
21

22 ²⁰(...continued)
23 acting in a discretionary function, and the Government
24 does not appear to be asking the Court to revisit that
25 determination. See September 4, 2009 Minute Order
Denying Motion to Dismiss (Doc. No. 179) at pp. 5-7.

26 In light of the Court's interpretation of General
27 Dynamics and California law under Olson, the Court does
28 not address Plaintiffs' contention that their claims fall
under an exception to General Dynamics in that they
"arise from the government's failure to follow its own
required procedures." (Am. Opp'n at p. 23.)

1 Olson Court held that the FTCA requires courts to
2 look to the state law liability of private persons,
3 not to that of public employees or entities, when
4 assessing the Government's liability under the FTCA,
5 even when the tort claim is based upon the
6 performance of "uniquely governmental" functions.
7 546 U.S. at 46.

8
9 The appropriate inquiry thus is whether, under
10 California law, the independent decision of a local
11 prosecutor would bar a malicious prosecution action
12 against a private person. This scenario has been
13 examined in cases where private persons maliciously
14 have lodged complaints with or given testimony to
15 district attorneys or other prosecutorial officials.
16 Under California law, such persons can be liable for
17 malicious prosecution so long as they were "actively
18 instrumental in causing the prosecution." Cedars-
19 Sinai Medical Center v. Super. Ct., 206 Cal. App. 3d
20 414, 417 (1988).²¹ See also Lauter v. Anoufrieve, 642
21 F. Supp. 2d 1060, 1093 (C.D. Cal. 2009) (private
22 citizens who filed police report may be liable for
23 malicious prosecution); Sims v. United States, No.

24
25 ²¹ The Court acknowledges that California law differs
26 from that of other states in this respect. Compare
27 Bressi v. Ford, 575 F.3d 891, 899 (9th Cir. 2009) (in
28 affirming dismissal of FTCA malicious prosecution claim,
noting Arizona law bars a malicious prosecution claim
where a criminal prosecutor has made an independent
decision to prosecute).

1 2:07-cv-02082-MCE, 2008 WL 4813827, at *4 (E.D. Cal.
2 Oct. 29, 2008) (applying Cedars-Sinai in FTCA case);
3 Ludwig v. Super. Ct., 37 Cal. App. 4th 8, 25 n. 26
4 (1995) (restating "actively instrumental" test);
5 Goehring v. Wright, 858 F. Supp. 989, 1000 (N.D. Cal.
6 1994) (neighbors may be liable for malicious
7 prosecution arising out of false complaints to
8 police). Under such a theory, a plaintiff must show
9 "that the defendant has at least sought out the
10 police or prosecutorial authorities." Sullivan v.
11 County of Los Angeles, 12 Cal. 3d 710, 720 (1974).
12

13 The letter from Agent Wong states: "We [ICE]
14 present this matter to you for probable violations of
15 the California [P]enal [C]ode." (Def.'s Ex. 1 at p.
16 1.) The letter laid out detailed evidence against
17 the Davises, and indicated an active desire to assist
18 in any prosecution that might come about. Agent Deal
19 then met with the prosecutor on the case. Based on
20 this evidence, Plaintiffs have produced sufficient
21 evidence to allow a fact finder to conclude that
22 federal agents "sought out" prosecutors, and were
23 "actively instrumental" in causing the state criminal
24 prosecution. Summary judgment on this basis thus is
25 inappropriate.
26
27
28

1 **2. Probable Cause**

2 The Government also argues that the undisputed
3 evidence establishes that the federal agents had
4 probable cause in instigating the state criminal
5 prosecution, and hence Plaintiffs cannot prevail on
6 their malicious prosecution claim.

7
8 Under California law, in the context of malicious
9 prosecution, probable cause is defined as ". . . an
10 honest suspicion or belief on the part of the
11 instigator of the prosecution, founded upon facts
12 sufficiently strong to warrant the average person in
13 believing the charge to be true." Cummings v. Fire
14 Ins. Exch., 202 Cal. App. 3d 1407, 1419 (1988). This
15 standard is applied "based upon the state of a
16 defendant's knowledge at the time a lawsuit is
17 initiated and . . . the facts known to the
18 defendant." Lauter, 642 F. Supp. 2d at 1093.

19
20 Plaintiffs were charged with violating California
21 Penal Code § 12021(a)(1). The relevant elements of
22 this crime are (1) the defendant is "[a] person who
23 has been convicted of a felony under the laws of the
24 United States, the State of California, or any other
25 state, government, or country" and (2) the defendant
26 "owns, purchases, receives, or has in his or her

1 possession or under his or her custody or control any
2 firearm." Cal. Penal Code § 12021(a)(1).

3
4 Agents Wong and Deal had probable cause to
5 believe BJ Davis had committed this crime at the time
6 they composed and sent the letter. They had reliable
7 information that BJ Davis had been convicted of a
8 felony - manslaughter - in the State of Louisiana.
9 (Wong Letter, Exs. 2, 7, 8.) They also had reliable
10 information that a shotgun was found in the master
11 bedroom of BJ Davis's house. (Wong Letter, Ex. 9.)
12 These two facts were sufficient as a matter of law to
13 create a "reasonable suspicion" that BJ Davis was
14 guilty of violating Penal Code section 12021(a)(1).

15
16 Plaintiffs have failed to identify any evidence
17 that suggests a contrary conclusion. They point to
18 the fact that the shotgun was registered to Julia
19 Davis only, and that BJ Davis had a "listed address"
20 other than the Yucca Valley house as evidence that BJ
21 Davis could not have been in possession of the
22 shotgun. (Am. Opp'n at 25.)

23
24 While these facts are relevant to whether the
25 State could prove BJ Davis's guilt beyond a
26 reasonable doubt in a criminal prosecution, they do
27 not defeat probable cause. The registration of a gun
28

1 to one owner in no way precludes another from
2 possessing it, as more than one person may possess
3 the same weapon concurrently. See People v.
4 Williams, 170 Cal. App. 4th 587, 625 (2009). The
5 Agents had significant evidence that BJ Davis
6 actually resided in the Yucca Valley house, including
7 declarations of Julia Davis's parents referring to
8 the house as the residence of their "daughter and BJ
9 Davis" (Wong Letter, Ex. 4 ¶ 2; Ex. 5 ¶ 2) and BJ
10 Davis's own use of the Yucca Valley address as his
11 residence when he was booked on the federal criminal
12 charges. (Wong Letter, Ex. 3.) Plaintiffs also cite
13 to Julia Davis's Declaration statement that BJ did
14 not know she had the gun there, (Am. Opp'n at 25,
15 citing Davis Decl. ¶ 78), but this declaration,
16 prepared for this motion, was not before the Agents
17 at the time the letter was prepared and sent, and is
18 thus irrelevant to the probable cause determination.

19
20 There is a separate question as to whether the
21 Agents had probable cause to believe that *Julia Davis*
22 had violated section 12021(a)(1). Since there was no
23 evidence that Julia Davis was a felon, Agents Wong
24 and Deal lacked probable cause to suspect that she
25 personally and independently violated section
26 12021(a)(1). Under California law, however, a person
27 may be guilty of a crime by aiding and abetting the
28

1 commission of that crime. Cal. Penal Code § 31. A
2 person aids and abets a crime when he or she (1)
3 "act[s] with knowledge of the criminal purpose of the
4 perpetrator" and (2) has the "intent or purpose
5 either of committing, or of encouraging or
6 facilitating commission of, the offense." People v.
7 Beeman, 35 Cal. 3d 547, 560 (1984). One may aid and
8 abet another's possession of a weapon. See In re
9 Malcolm M. 147 Cal. App. 4th 157, 169-70 (2007).

10
11 At the time Agents Wong and Deal sent the letter,
12 they possessed evidence that (1) Julia Davis
13 purchased the gun; (2) Julia Davis had knowledge of
14 her husband's felony conviction;²² and (3) the gun was
15 stored in their joint marital bedroom. (Wong Letter,
16 Exs. 6-8.) Agent Deal has stated that his
17 investigation led him to conclude that Julia Davis
18 "had purchased the shotgun" as "a straw man
19 purchase." (Deal 2009 Dep. 234:11-235:16.) This was
20 sufficient to establish a reasonable suspicion that
21 Julia Davis intentionally obtained the gun to
22 encourage or facilitate her husband's possession of
23

24
25 ²² At the hearing on this motion, Plaintiffs' counsel
26 suggested that this evidence did not show Julia Davis had
27 knowledge of BJ Davis's conviction at the time she
28 purchased the gun, but a review of the evidence suggests
otherwise. Julia Davis filed copies of her husband's
conviction and pardon record in the MSPB proceedings in
October 25, 2004. (Def.'s Ex. 1, Ex. 7.) She purchased
the gun in April 2005. (Def.'s Ex. 6.)

1 it, despite his felony conviction. Again, Julia
2 Davis's statements in connection with this motion
3 that BJ Davis had no knowledge of the gun's
4 existence, while relevant to her ultimate guilt, do
5 not defeat probable cause.

6
7 Since Agents Wong and Deal possessed probable
8 cause to believe that BJ and Julia Davis both
9 violated California Penal Code § 12021(a)(1) when
10 they communicated with county prosecutors, the
11 Government's motion for partial summary judgment as
12 to Plaintiffs' malicious prosecution claim is
13 GRANTED.

14
15 **B. Abuse of Process**

16 Plaintiffs' abuse of process claim is premised on
17 several distinct acts by federal agents. They
18 contend the following actions constituted abuses of
19 process:

20 (1) The October 9, 2004 search of the Beverly
21 Hills Film Studios and seizure of Plaintiffs'
property from that location;

22 (2) The August 9, 2005 instigation of federal
23 immigration fraud charges against Plaintiffs
based on false information;

24 (3) The August 10, 2005 search of Plaintiffs'
25 residence and seizure of Plaintiffs' property
from that location;

26 (4) The failure to provide Plaintiffs with
27 exculpatory evidence obtained from the Screen
28 Actors Guild in the course of the federal
criminal action; and

(5) "Urging" the San Bernardino District Attorney to file charges against Plaintiffs for unlawful possession of a firearm.

(SAC ¶¶ 133-37.)²³

"To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." Rusheen v. Cohen, 37 Cal. 4th 1048, 1056 (2006). The Government contends that Plaintiffs cannot establish any of the five actions described above constituted such an abuse of process for four different reasons: (1) abuse of process is not available to attack the initiation of a criminal proceeding; (2) the OPR Agents' communications to law enforcement are absolutely protected by statutory privilege; (3) prior rulings of this Court bar any

²³ In their Amended Opposition, Plaintiffs argue that federal agents also abused process by (1) "revealing to dangerous suspects of an FBI investigation that Plaintiffs were informants"; (2) "conducting warrantless and unauthorized land and aerial surveillance"; and (3) "attempting to use these trumped up [immigration fraud] charges to nullify the EEOC ruling[.]" (Am. Opp'n at 22.) Such allegations are not contained in the operative Second Amended Complaint, and thus cannot be considered by the Court. "[A] plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." Centex Homes v. Fin. Pac. Ins. Co., No. CV F 07-00567 AWI, 2009 WL 5030138, at *5 (E.D. Cal. Dec. 16, 2009), quoting Speer v. Rand McNally & Co., 123 F.3d 658, 665 (7th Cir. 1997). See also Pickern v. Pier 1 Imp. (U.S.), Inc., 457 F.3d 963, 968-69 (9th Cir. 2006).

1 claims relating to a failure to produce exculpatory
2 evidence; and (4) their claims related to searches
3 and seizure of property fail to state a claim.

4
5 **1. Abuse of Process and the "Initiation" of
Criminal Proceedings**

6 The Government argues that "abuse of process is
7 not an appropriate cause of action to attack the
8 initiation of a criminal proceeding," as the tort is
9 "founded upon subsidiary activity within the
10 lawsuit." (Def.'s Mem. at p. 12, quoting Adams v.
11 Super. Ct., 2 Cal. App. 4th 521, 528 (1992).) This
12 is a correct statement of the law. The California
13 Supreme Court has held, "while a defendant's act of
14 improperly instituting or maintaining an action may,
15 in an appropriate case, give rise to a cause of
16 action for malicious prosecution, the mere filing or
17 maintenance of a lawsuit - even for an improper
18 purpose - is not a proper basis for an abuse of
19 process action." Oren Royal Oaks Venture v.
20 Greenberg, Bernhard, Weiss & Karma, Inc., 42 Cal. 3d
21 1157, 1169 (1986). See also Lunsford v. Am.
22 Guarantee & Liab. Ins. Co., 18 F.3d 653, 655 (9th
23 Cir. 1994); Contemporary Servs. Corp. v. Staff Pro
24 Inc., 152 Cal. App. 4th 1043, 1059 (2007). Although
25 the Government is correct as to this legal principle,
26 its application to this case is not as wide-reaching
27 as the Government suggests.

1 The Government contends that this principle bars
2 Plaintiffs' abuse of process claim insofar as it is
3 based on the "instigation" of the filing of the
4 federal criminal charges; the withholding of
5 exculpatory evidence in the federal criminal
6 proceedings; and the "urging" of state prosecutors to
7 bring the weapons possession charges.

8
9 The Court agrees that Plaintiffs cannot state a
10 claim for abuse of process based on either the
11 instigation of the federal criminal charges or the
12 OPR Agents' role in the filing of state criminal
13 charges under the case law noted above. The sole
14 action for recovery in tort for the bringing of
15 meritless charges is malicious prosecution. See
16 Bidna v. Rosen, 19 Cal. App. 4th 27, 40 (1993). The
17 Government is thus entitled to summary judgment as to
18 the abuse of process claims based on these two
19 events.²⁴

20
21 This principle has no bearing, though, on an
22 abuse of process claim based on the withholding or
23 concealment of exculpatory evidence. Such a claim
24 directly targets "subsidiary activity within the
25

26 ²⁴ The Court thus need not address the Government's
27 argument that these actions are protected by the absolute
28 privilege for certain communications to law enforcement
agencies provided by Cal. Civil Code § 47.

lawsuit," and has been held viable as a matter of law by at least one other California district court. See Garcia v. City of Merced, 637 F. Supp. 2d 731, 751 (E.D. Cal. 2008). Nonetheless, Plaintiffs have failed to address this claim in their Opposition or provide any evidence whatsoever concerning the alleged withholding of exculpatory evidence, and it appears this claim has been abandoned. The Government is thus entitled to summary judgment on the abuse of process claim as to this event as well.

2. Abuse of Process and Search and Seizure

The only remaining claimed abuses of process are the October 2004 search of and seizure of property from BHFS, and the August 2005 search of and seizure of property from the Davises' Yucca Valley house. The Government contends that Plaintiffs have failed to state a claim regarding either of these searches.

The Government first contends that the stipulated dismissal of Plaintiffs' conversion claim as to both searches (Doc. No. 127) and the stipulated dismissal of Plaintiffs' trespass claim as to the October 2004 search (Doc. No. 242) somehow bar these abuse of process claims. (Def.'s Mem. at p. 14.) But neither of the dismissals, which were without prejudice, have any impact on the merits of the remaining claims. "A

1 plaintiff who sets forth alternative remedies in
2 separate counts in his complaint may abandon or
3 dismiss one count without prejudice to his right to
4 proceed on the other." Amadeo v. Principal Mut. Life
5 Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002). See
6 also Wilson-Cook Med., Inc. v. Wilson, 942 F.2d 247,
7 251 (4th Cir. 1991) (the effect of an order granting
8 voluntary dismissal is merely "to tailor the
9 complaint to its final form").

10
11 The Government next argues that "the taking of
12 property, regardless of its lawfulness, is not an
13 abuse of process." (Def.'s Mem. at p. 14.) The
14 Government provides no citation for this proposition,
15 nor has the Court located any supporting authority.
16 To the contrary, relevant California legal authority
17 suggests that the wrongful taking of property
18 pursuant to a judicial order can constitute an abuse
19 of process. See Microsoft Corp. v. A-Tech Corp., 855
20 F. Supp. 308, 311-12 (C.D. Cal. 1994) (improper
21 freezing of assets can serve as basis for abuse of
22 process claim); Bidna, 19 Cal. App. 4th at 40 (noting
23 abuse of process claims can arise from improper or
24 excessive attachment of property); 6A Cal. Jur. 3d
25 Assault and Other Wilful Torts § 17 ("An abuse of
26 process may occur where process is used for the
27
28

1 unauthorized purpose of acquiring property for one's
2 own use.").

3
4 Moreover, Plaintiffs have alleged that the
5 searches themselves, and not just the resulting
6 property seizures, were abuses of process. (SAC ¶¶
7 133, 135.) While the Government has stated that the
8 execution of search or arrest warrants lies "outside
9 the auspices of the judicial system," it cites no
10 authority for this proposition. (Am. Reply at p. 8.)
11 A warrant is by its very nature an exercise of
12 judicial power, and is only issued based upon one or
13 more judicial determinations. See, e.g., Florida
14 Dep't of State v. Treasure Salvors, Inc., 458 U.S.
15 670, 705 (1982) (warrant for arrest invokes judicial
16 power); Platz v. Marion, 35 Cal. App. 241, 245 (1917)
17 (employing "the authority to issue a warrant of
18 arrest . . . necessarily exercises the judicial
19 powers").

20
21 Many courts, both in California and in other
22 jurisdictions, have recognized that an abuse of
23 process claim may lie where an arrest or search
24 warrant was improperly *obtained*. See Garcia, 637 F.
25 Supp. 2d at 751 (citing Gonzalez v. Immigration &
26 Naturalization Serv., 405 F.3d 45, 50 (1st Cir.
27 2005)). See also U.S. Steel, LLC v. Tieco, Inc., 261

1 F.3d 1275, 1291-92 (11th Cir. 2001) (applying Alabama
2 law); VanZandt v. Fish & Wildlife Serv., 524 F.
3 Supp. 2d 239, 246-47 (W.D.N.Y. 2007) (applying New
4 York law). While claims alleging that the execution
5 of the warrant was an abuse of process are less
6 common, several courts in other states have suggested
7 the execution of a warrant can constitute an abuse of
8 process. See, e.g., Gibson v. Regions Fin. Corp.,
9 557 F.3d 842, 845 (8th Cir. 2009) (applying Arkansas
10 law); Washington v. Drug Enforcement Admin., 183
11 F.3d 868, 875 (8th Cir. 1999) (applying Missouri
12 law); Eliason Corp. v. Bureau of Safety & Regulation
13 of Mich. Dep't of Labor, 564 F. Supp. 1298, 1307
14 (W.D. Mich. 1983) (applying Michigan law). Under
15 California law, as in these other states, "[t]he
16 essence of the tort 'abuse of process' lies in the
17 misuse of the power of the court; it is an act done
18 in the name of the court and under its authority for
19 the purpose of perpetrating an injustice." Estate of
20 Tucker ex rel. Tucker v. Interscope Records, Inc.,
21 515 F.3d 1019, 1037 (9th Cir. 2008), quoting Stolz v.
22 Wong Communications Ltd. P'ship, 25 Cal. App. 4th
23 1811, 1822 (1994). The Court therefore concludes
24 that the misuse of a judicially-sanctioned warrant to
25 search or take property for improper motives, as
26 alleged here, may constitute an abuse of process.

1 The Court thus proceeds to examine the evidence
2 presented as to each of the two searches in order to
3 determine if Plaintiffs have sufficiently stated an
4 abuse of process claim.

5
6 **a) The October 2004 Search**

7 There is insufficient evidence on the record to
8 support Plaintiffs' claim for abuse of process based
9 on the October 2004 search of and seizure of property
10 from BHFS.

11
12 In their Amended Opposition, Plaintiffs do not
13 discuss this incident at all. Julia Davis addresses
14 the seizure of documents from BHFS in vague terms in
15 her Declaration (Davis Decl. ¶ 54), stating:

16 The agents also took advantage of this
17 investigation to improperly seize personal
18 documents and materials belonging to both BJ
19 and I without a warrant and without any
20 consent from either one of us. The seized
21 documents included files on my EEOC case
22 against the government, banking and files
23 collected on the investigations launched
24 against BJ Davis and I by Agents Deal,
25 Kaufer, and Broyles.

26 (Davis Decl. ¶ 54.) Julia Davis does not indicate
27 she was present at the scene of the search, nor that
28 she personally observed the seizure of any documents
or materials. Therefore the statement lacks
foundation, and is inadmissible.

1 The only evidence cited as support for Julia
2 Davis's statement is an excerpt from a brief filed by
3 the Government in the federal criminal case, which
4 states that "Documents obtained from the Beverly
5 Hills Film Studio were not seized, as alleged by
6 defendants, but provided voluntarily by the studio."
7 (Davis Decl. ¶¶ 54, 135, Ex. 50 at p. 9.)
8 "Statements in briefs are not evidence of the facts
9 asserted." In re Heritage Bond Litig., No. CV
10 02-1475-DT(RCx), 2004 WL 1970058, at *4, n. 4 (C.D.
11 Cal. July 23, 2004), quoting Bell v. United Princeton
12 Props., Inc., 884 F.2d 713, 720 (3d Cir. 1989). See
13 also Carrillo-Gonzalez v. Immigration &
14 Naturalization Serv., 353 F.3d 1077, 1079 (9th Cir.
15 2003) (argument by counsel is not evidence). While
16 in some circumstances, representations in briefs may
17 be considered admissions, see Marceau v. Int'l Bhd.
18 of Elec. Workers, 618 F. Supp. 2d 1127, 1170 n. 13
19 (D. Ariz. 2009) (citing United States v. One Heckler-
20 Koch Rifle, 629 F.2d 1250, 1253 (7th Cir. 1980)), the
21 cited material could only be an admission that some
22 documents were received from BHFS at some point in
23 time. This does not provide any details as to what
24 documents were obtained, or the circumstances under
25 which they were obtained. Accordingly, Plaintiffs
26 have failed to produce sufficient evidence to support
27
28

1 an abuse of process claim based on any search of, or
2 seizure of property from, BHFS.

3
4 **b) The August 2005 Search**

5 Plaintiffs have produced significant evidence
6 about the August 2005 raid and search of their
7 residence, as noted above. This evidence is
8 sufficient to create a factual question as to whether
9 federal agents committed an abuse of process when
10 they conducted that search pursuant to the arrest
11 warrant.

12
13 The use of the arrest warrant to launch the raid
14 and search on Plaintiffs' house, and to seize
15 property therein, will be an abuse of process if the
16 involved agents "(1) contemplated an ulterior motive
17 in using the process, and (2) committed a willful act
18 in the use of the process not proper in the regular
19 conduct of the proceedings." Rusheen, 37 Cal. 4th at
20 1056. "The ulterior motive element can be inferred
21 from proof of a willful improper act." Flores v.
22 Emerich & Fike, No. 1:05-CV-0291 AWI, 2008 WL
23 2489900, at *13 (E.D. Cal. June 18, 2008); see also
24 Charles J. Vacanti, M.D., Inc. v. State Comp. Ins.
25 Fund, 24 Cal. 4th 800, 824 (2001).

1 The events of August 10, 2005 were carried out in
2 accordance with an operational plan drafted by Agent
3 Deal, utilizing the resources of the SRT, which were
4 obtained by Agent Deal. There is thus no dispute
5 that the events of that day were the "willful" acts
6 of federal employees. A more difficult question,
7 though, is whether the search was "not proper in the
8 regular conduct of the proceedings." In light of the
9 substantial evidence presented by Plaintiffs as to
10 the magnitude of the search, and the Government's
11 failure to identify undisputed facts in support of a
12 contrary finding, the Court holds that a reasonable
13 fact finder could find the extreme nature of the
14 search and raid of the Davises' Yucca Valley home was
15 "not proper in the regular conduct of the
16 proceedings."

17
18 Throughout their opposition, Plaintiffs have
19 identified evidence that suggests the degree of force
20 used in the search was severe, particularly in light
21 of the nonviolent nature of the charges against the
22 Davises. An Expert Witness, Retired CBP Supervisor
23 Leonard Rios, stated that, in his expert opinion,
24 without Agent Deal's specific (false) claim to the
25 SRT that BJ Davis had previously been convicted of
26 "first degree murder," the SRT would not have been
27 involved in the arrest at all. (Davis Decl., Ex. 77
28

1 at p. 33.)²⁵ Agent Deal has admitted that he had
2 reviewed the records of BJ Davis's conviction at the
3 time he met with the SRT, (Deal 2009 Dep. at 129:14-
4 134:6), and those records showed that BJ Davis had
5 been convicted of and pardoned of the lesser charge
6 of manslaughter.

7
8 The reports of the Agents involved suggest no
9 attempt to arrest the Davises in a more peaceable
10 manner was ever even considered. According to Julia
11 Davis's parents, in the course of the search, Agent
12 Deal told them that Mrs. Davis was a "domestic
13 terrorist," a statement without any support. (Kot
14 Decl. ¶ 10; Kovalska Decl. ¶ 11.) At some point on
15 the day of the raid, someone scrawled the word
16 "Boo!" and crossed out the date on Julia Davis's
17 calendar, located in her home. (Davis Decl., Ex.
18 61.) As discussed above, several witnesses have
19 testified that documents and other items were seized
20 from the home, though no receipt was given. The
21 search of the home continued long after it was
22 determined the persons named in the arrest warrant
23 were not present. Together, this evidence creates a

24
25 ²⁵ At the hearing on the Motion, counsel for the
26 Government stated he intends to challenge Rios's
27 qualifications as an expert witness should this case
28 proceed to trial. However, the Government made no
objection to the consideration of Rios's declaration in
connection with this Motion, despite the opportunity to
do so in its Reply.

1 question of material fact as to whether the manner in
2 which the arrest warrants were executed was proper.

3
4 There is also sufficient evidence for a
5 reasonable fact finder to conclude the OPR Agents had
6 an ulterior, improper motive: retaliation for Julia
7 Davis's successful EEOC complaint. "[A]n arrest
8 warrant is not to be used for unlawful retaliation."
9 Garcia, 637 F. Supp. 2d at 751. In addition to the
10 unusual degree of force used in executing the
11 arrests, the arrest warrants were executed two months
12 after the EEOC ALJ issued his initial decision in
13 Julia Davis's sexual harassment case, which was in
14 her favor and highly critical of CBP, ICE, and their
15 internal investigators. (EEOC Op.) Agents Deal,
16 Kaufer, and Wong had all been involved in Julia
17 Davis's EEOC and MSPB proceedings. See, e.g., Davis
18 Decl., Ex. 9 (January 10, 2005 Dep. of Jeffrey Deal);
19 Ex. 18 (January 10, 2005 Dep. of James Wong); Ex. 33
20 (January 10, 2005 Dep. of Herbert Kaufer.) One week
21 after the search, CBP moved to hold the ALJ's
22 decision in abeyance based on the federal criminal
23 charges. (Davis Decl., Ex. 2.) The sum total of
24 these facts is sufficient to allow a fact finder to
25 infer a retaliatory or malicious motive in the
26 execution of the search. Cf. George v. Cal.
27 Unemployment Ins. Appeals Bd., 179 Cal. App. 4th 1475

(2009) (finding sufficient evidence to support an inference of retaliatory motive for FEHA claim); McRae v. Dep't of Corrs. & Rehab., 142 Cal. App. 4th 377, 388 (2006) (knowledge of protected activity and proximity in time between protected action and alleged retaliatory act sufficient to establish prima facie case under FEHA). Plaintiffs have therefore produced sufficient evidence to allow a reasonable fact finder to conclude the August 2005 search was an abuse of process.²⁶

The Court thus GRANTS the Government's motion for partial summary judgment as to the abuse of process claim as to all alleged abuses except the August 2005

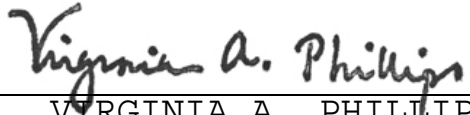
²⁶ At the hearing on this Motion, Plaintiffs' counsel suggested that a question of fact as to whether the August 2005 search constituted an abuse of process potentially limited the Government's ability to use the shotgun seized in that search to support defendant's showing of probable cause on the malicious prosecution claim. Even if the shotgun was the fruit of an unlawful seizure, though, in a civil proceeding like this one, there is no exclusionary rule which would bar the Government from introducing it as evidence in a malicious prosecution lawsuit to establish probable cause. See Ecker v. Raging Waters Group, Inc., 87 Cal. App. 4th 1320, 1329 (2001). See also Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 363 (1998) (noting exclusionary rule generally applies only to criminal trials); Townes v. City of New York, 176 F.3d 138, 146 (2d Cir. 1999) (declining to extend the fruit of the poisonous tree doctrine to section 1983 action); Cyrus v. City of New York, No. 06 CV 4685 (ARR), 2010 WL 148078, at *4 (E.D.N.Y. Jan. 14, 2010) ("the exclusionary rule does not apply to the probable cause determination in malicious prosecution claims"); McDaniel v. City of Seattle, 65 Wash. App. 360, 364-67 (1992) (evidence suppressed in criminal proceeding admissible for showing probable cause in malicious prosecution civil suit).

1 search of and seizure of property from the Davises'
2 home, and DENIES the motion as to the August 2005
3 search.

4 **VI. CONCLUSION**

5 In accordance with the foregoing, the
6 Government's Motion for Partial Summary Judgment is
7 GRANTED as to Plaintiffs' malicious prosecution claim
8 in its entirety, and GRANTED in part and DENIED in
9 part as to Plaintiffs' abuse of process claim.

10
11 Dated: January 28, 2010



VIRGINIA A. PHILLIPS
United States District Judge